IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NOS. 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366 AND 367 OF 2006

Pyramid Finance Limited, a Company incorporated under the Companies Act, 1956, having its Registered Office at Salgaocar House, F. L. Gomes Road, Vasco da Gama, Goa, 403 802 and Corporate Office at Third Floor, Salgaocar Centre, Rua de Ourem, Panaji-Goa-403 001, represented herein by its duly constituted Power of Attorney, Shri Alistair Noronha.
(Registered Address). ..... Applicant

Versus

Mr. Ramkrishna Iyer, Proprietor, PC-Clinik, X-6A, Apna Bazar, A-Building V. V. Road, Margao, Goa.
(Registered Address). ..... Respondent.

Mr. N. Vaze, Advocate for the Applicant.

Mr. A.. D. Bhobe, Advocate for the Respondent.

CORAM: N. A. BRITTO, J.

DATE: 18th January, 2007.

ORAL JUDGMENT

These applications are filed by the Complainant for Special Leave to

Appeal against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881, (*Act*, for short), vide Judgments dated 09.06.2006 of the learned J.M.F.C., Panaji.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said complaints.

3. Since the complaints involve facts which are common and so also the law applicable thereto, they are being disposed off by this common Judgment.

4. The Complainant is a Finance Company and carries on the business of Leasing/Hire Purchase of Computers, etc., while the accused is the Proprietor of the business known as M/s. PC Clinik.

5. There were three Hire Purchase Agreements between the Complainant and the Accused entered into on three different dates, the terms of which were common. As per the terms of the said Agreements, the accused was required to deposit certain amounts of money with the Complainant. Certain equipments like computers, etc., were given to the accused on hire purchase basis, and in terms of Clause 4.4, the accused was required to hold the said equipment as Bailee without claiming any right, title or interest but with an option to buy the said equipment at the end 36 months at a price of Re.1/-. This was in terms of Clause 2.7.2. The monthly payment for hire of the said equipment was required to

be paid by the accused by giving to the Complainant cheques and, in fact, there is no dispute that the accused had handed over blank cheques to the Complainant by way of payment for the use of the said equipment. That was done in terms of Clause 2.2.4 of the said Agreement. The accused was also required to insure the said equipment in terms of Clause 4.7 of the Agreement. The Agreement also provided that upon the failure of the accused to insure the equipment, the Complainant could also insure the same. This was provided by Clause 4.10. There is also no dispute that the accused did insure the said equipment with New India Assurance Company Limited. All the blank cheques issued by the accused to the Complainant were regularly honoured till May 2002.

6. There was fire in the office premises of the accused on 29.06.2002, as a result of which, the equipment taken on hire by the accused from the Complainant, came to be destroyed. As stated by the accused, and not disputed by the Complainant, the said destruction came about on account of electric short circuit and this was the subject matter of the news item which appeared on Sunday Navhind Times dated 30.06.2002. Upon the destruction of the equipment by fire, the accused preferred his claim to New India Assurance Company, which did not accept the claim and it appears that the accused has been compelled to raise a dispute against the said New India Assurance Company, before the Consumer Disputes Redressal Forum and the case is pending. In terms of the said Agreement between the parties and as otherwise stated by the accused, upon the claim being settled by Insurance Company, the total value of the equipment which was

destroyed would be directly payable to the Complainant. In terms of Clause 4.8 of the Agreement, it is the accused who was required to raise the claim under the insurance policy and take money due thereon on behalf of and in trust for the Complainant. Clause 4.9 of the Agreement also provided that it is the Complainant, as owner would at its option, apply the insurance proceeds in making good the damage or in replacing the equipment by other similar equipment or item to which the terms of the Agreement would apply. Clause 4.9 also provided that the Complainant, as owner was entitled to terminate the Agreement and to retain any insurance proceeds received by the owner in respect thereof.

7. Admittedly, the Agreements between the Complainant and the Accused have not been terminated till date by the Complainant.

8. As already stated, there was no problem between the Complainant and the accused for about eight months or so when the cheques issued by the accused to the Complainant were honoured after the same were dated, filled in and presented by the Complainant for payment. The accused has stated that no cheques were deposited by the Complainant from June 2002 to July 2003. This has not been seriously contested on behalf of the Complainant. The accused in his cross examination has admitted that after the incident of fire, he paid some amount to the Complainant as goodwill, as the Complainant had stopped depositing further cheques issued by the accused. The accused had specifically denied that the Complainant had stopped depositing the cheques for sometime as during that time,

he had agreed to make necessary payments to the Complainant.

9. Both the parties have been unable to throw any light as to what sums were paid by the accused as goodwill gesture after the equipment taken on hire by the accused was destroyed on 29.06.2002 but the parties are ad idem that the amount paid by the accused to the Complainant did not represent the amount due on any of the cheques, which had remained unpaid for any particular month. At this stage, it may be noted that the complaints pertained to 34 cheques, the earliest being dated 15.01.2003 for Rs.10,000/- and the last being dated 01.05.2004 for Rs.7,306/-. In other words, the record shows that the Complainant for about six months after the incident of fire, chose not to fill in any of the blank cheques and deposit the same for payment inspite of the fact that the Complainant was due and payable the rentals of June 2002. In fact, the accused had stated that cheque dated 01.01.2003 (should be 15.01.2003?), was deposited by the Complainant in the month of July 2003, which fact has not been contested by the Complainant.

10. The learned trial Court by separate Judgments of the same date, acquitted the accused by accepting the contention raised on behalf of the accused that Clause 2.2.2 of the Agreement between the parties could not be interpreted to include the contingency of accidental destruction of the goods/equipment by fire and therefore, the accused was not liable to pay the rentals in respect of the goods which were not in existence. The learned trial Court also observed that it was the consistent case of the accused that he was not liable to pay the rentals after the

goods were destroyed by fire on 29.06.2002.

11. The controversy is centered on Clause 2.2.2 of the Agreement and to some extent on Clause 4.14 of the said Agreement as per the learned Counsel appearing on behalf of the Complainant. Clause 2.2.2 which is far more important reads thus:

> "The Hirer (accused) shall pay the instalments regularly and punctually, without any deduction or abatement, and the Hirer agrees that this obligation shall remain absolute in all circumstances generally and specifically without any reference to the state, description, use or performance of the equipment."

12. Clause 2.2.4, as already seen, dealt with mode of payment of rentals and provided that the Owner/(Complainant) may require the Hirer/(accused) either at the inception of the hire purchase or at any time thereafter to give to the owner cheques, promissory notes or any other acceptable instruments or to issue in favour of the owner for all or any sums payable under this Agreement, payable immediately or in future and such cheques or notes or other instruments shall be deemed to have been given for adequate consideration already received by the Hirer and shall not absolve the Hirer from his liability to pay the said sums hereunder until the cheque, note or other instrument is duly realised.

13. Clause 4.4, as already, seen provided that the equipment taken on hire by the accused was required to be taken by him as a Bailee (owner), and Clause 4.14 provided that the Complainant would be indemnified against only loss under distress, execution, damage by fire, etc.

14. Chapter IX of the Indian Contract Act, 1872, (*Contract Act*, for short), deals with bailment and Section 151 of the Contract Act deals with the care to be taken by bailee and it provides that in all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. Section 152 of the Contract Act stipulates as to when a Bailee would not be liable for loss, etc., of thing bailed, and provides that the bailee in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151. The two authorities cited on behalf of the Complainant and reported in the cases of ***Balkrishan R. Dayma v. Bank of Jaipur Ltd. (1971 Company Cases, 557)*** and ***Shamji Bhanji & Co. v. North Western Railway Co. (AIR (34) 1947 Bombay 169),*** reiterate the principle underlying Section 151 that a bailee is required to take care of the goods bailed to him as a man of ordinary prudence would under similar circumstances, take of his own goods of the same bulk, quantity, etc. The Division Bench of this Court in the first case reiterated the principle by observing that the only liability of a bailee is for negligence under Section 151 of the Indian Contract Act. It must, therefore, be

shown in the first place by the bailee that the loss of the goods entrusted to him was not due to his or his servants' negligence, or, rather, to put it in a positive form, the bailee must show that he took the ordinary care of goods pledged as required by Section 151 of the Indian Contract Act. In the second case, dealt with by the learned Single Judge of this Court, the goods were consigned by the plaintiffs at Railway risk, the plaintiffs having paid increased charges in respect of his goods which were dangerous, explosive and combustible articles. Referring to Section 76 of the Railway Act, the learned Single Judge observed that the Section was clear on the point as to whom the onus of proof lies and further observed that the responsibility of the railway administration is that of a bailee, and once the entrustment of the goods to the railway administration is proved and it is also proved that the goods were not delivered by the railway company in accordance with the terms of the railway receipt issued by them, the goods having been destroyed by fire while in the custody of the railway company, the onus would be on the railway administration to prove that within the terms of Section 151 of Contract Act, they took as much care of the goods bailed to them as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. The learned Single Judge then referred to two cases of Allahabad and Madras High Courts reported in ***22 All. 361*** and ***22 Mad. 524*** in support of that proposition. In the case at hand, till date, the Complainant has not attributed any negligence to the accused and it has been categorically stated by the accused that the equipments got destroyed due to fire which had arisen on account of a short circuit. However, I must hasten to add

that we are not concerned herein with the recovery of the value of the goods destroyed since admittedly none of the cheques were issued by way of consideration of the same but were issued by way of future payment of the rentals payable by the accused from time to time. It has been submitted on behalf of the Complainant by learned Counsel that the first decision has been cited to draw a parallel between Clause 7 which was concerned in the said case and Clause 2.2.2 of the suit Agreement. In the first case of ***Balkrishan R. Dayma*** (supra), provided as follows:

> "That the borrowers shall be responsible for the quantity and quality of the said goods pledged with the bank and also for the correctness of statements and returns furnished by them to the bank from time to time as mentioned above. The bank shall be at liberty at any time in its discretion to get the goods weighed and valued at the expense of the borrowers, and that during the continuance of this agreement the borrowers shall be responsible for all losses, damages or deterioration of the said goods caused by theft, fire, fire, rain, floods, earthquake, lightning or any other cause, whatever, notwithstanding that the goods may be in the possession or under the control of the bank. (emphasis by Complainant).

15. After referring to ***Haigh v. Royal Mail Steam Packet Co. ((1880) 52 L.J.Q.B. 640(C.A.)*** and with reference to Clause 7 of the said Agreement, the

learned Division Bench observed that it is quite clear that if the words "*any loss however caused*" or "*under any circumstances*" are used, you give sufficient warning that the person who is entrusted with the goods is not going to be responsible for his servants not exercising due care and it is not necessary to employ express words like "*whether caused by my servants' negligence*". As Clause 7 contains the words, "*loss caused by any other cause whatever"* they are wide enough to include negligence on the part of the defendants' servants in taking care of the said goods. The learned Division Bench therefore, confirmed the finding of the learned trial Judge that on a reasonable, businesslike construction of clause 7, the first defendant bank is exempted from the liability for negligence on the part of their servants in taking care of the said pledged goods".

16. Learned Counsel on behalf of the Complainant contends that like the liability as per Clause 7 of the Agreement in case of ***Balkrishan R. Dayma*** (supra), the liability of the accused in this case was absolute, unconditional and all pervasive, whether the computers were in existence or not or whether they were destroyed by fire or not and that even in case the computers/equipment was destroyed by fire, still the accused was liable to pay to the Complainant the rentals of the same. Learned Counsel on behalf of the Complainant contends that Clause 2.2.2 of the Agreement does not provide that the liability of the accused would cease in case of a fire or otherwise was not conditional and, therefore, the destruction of the equipment let out by the Complainant to the accused would not discharge the accused from meeting his liability towards the rentals for use of the

said equipment. Learned Advocate on behalf of the Complainant contends that whatever might have been the circumstances in which the accused was placed the liability to pay the rentals of the computers, was absolute. On the other hand, learned Counsel on behalf of the accused, submits that the Complainant correctly understood the import of Clause 2.2.2 and, for that reason, did not fill in and deposit the cheques for nearly six months. Learned Counsel on behalf of the accused further submits that for the accused to continue to pay the rentals, the equipments rented out had to be in existence whatever state it might have been as contemplated in Clause 2.2.2. In other words, the learned Counsel on behalf of the accused, contends that the existence of the equipment had to be there whether in working condition or not and only then the liability of the accused to pay the rentals would subsist. Learned Counsel further submits that it is also not the case of the Complainant that the fire had taken place on account of any negligence on the part of the accused or for that matter, the accused was responsible in any way for the said fire which led to destruction of the computers taken on hire by the accused from the Complainant.

17. In my view, no parallel can be drawn from the case of ***Balkrishan Dayma*** (supra), which could be applied to the facts of this case. If at all anybody understood the terms of the agreement correctly, it is the Complainant who for about six months or more chose not to fill in any of the blank cheques to present for payment from June, 2002 till January 2003, rather than the accused who made certain payments as a goodwill gesture. In my view, the interpretation sought to be

placed on behalf of the Complainant on clause 2.2.2 cannot be accepted in the context of the entire agreement, read as a whole. If the same is accepted, it would only mean that the accused would continue not only to pay the rentals of the said computers when they have been destroyed by fire and at the end of the agreement, could purchase the same for Re.1/-, when the same have been destroyed and yet allow the Complainant to take the value of the same from the insurer as contemplated under the Agreement. In my view, the said clause could not be invoked to demand payment for use of computers which were non existent or destroyed by fire. There is no doubt that the obligation, as heading of Clause 2.2.2 shows, to pay the rentals was absolute and was not conditional but the words "*without any reference to the state, description, use or performance of the equipment*" are of special significance. A reasonable business like construction of Clause 2.2.2 would be that the Complainant was required to pay the rentals as long as the computers/equipment were in existence whatever state they might have been whether working or non-working condition and it is for this reason that the parties contemplated that the computers/equipment would be insured by the accused and the insurance proceeds obtained by the Complainant in case of loss, as the computers continued to belong to the Complainant till the end of 36 months and at the end of which the accused would get an option to purchase the same at Re.1/-. The liability to pay the rentals on the part of the accused in terms of Clause 2.2.2 would have continued only in case the computers were there in whatever state, whether performing or not performing but certainly not in case they ceased to exist by virtue of destruction by fire, for which a different provision was made by the

parties and incorporated in the said Agreement. Since the computers belonged to the Complainant and taken on hire by the accused got destroyed by accidental fire, for which the Complainant has made no grievance against the accused, the liability to pay the rentals ceased from the time the computers got destroyed and the next option of the Complainant was only to receive the price from the the insurer as per the other clauses of the Agreement. If the accused had no liability to pay the rentals, the subject cheques for rentals from June 2002 could not have been completed by the Complainant and deposited to collect payment since the same would be without any consideration as the accused had no liability to pay the rentals. Viewed thus, the accused had discharged his burden that the subject cheques were completed by the Complainant for a non-existence debt and, therefore, the accused could not be penalized in case such cheques were dishonoured by him.

18. In my view, the accused was rightly acquitted under Section 138 of the Act. There is no merit in these applications and, consequently, the same are hereby dismissed.

N. A. BRITTO,J.

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